

**THIS DISPOSITION IS NOT
CITABLE AS PRECEDENT OF
THE TTAB**

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PTH

UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

In re Leiner Health Services Corp.

Serial No. 76375801

Michael A. Painter of Issacman, Kaufman & Painter for
Leiner Health Services Corp.

Ronald McMorro, Trademark Examining Attorney, Law Office
105 (Thomas G. Howell, Managing Attorney).

Before Simms, Hairston and Holtzman, Administrative
Trademark Judges.

Opinion by Hairston, Administrative Trademark Judge:

Leiner Health Services Corp. has filed an application
to register the mark NATURE'S FOCUS for "vitamins and
dietary food supplements."¹

The Trademark Examining Attorney has finally refused
registration under Section 2(d) of the Trademark Act, 15

¹ Serial No. 76375801, filed February 21, 2002, based on an
allegation of a bona fide intention to use the mark in commerce.

U.S.C. §1052(d), on the ground that applicant's mark so resembles the mark NATURAL FOCUS, previously registered for "vitamin, mineral and protein supplements for human consumption,"² that if used on applicant's goods, it would be likely to cause confusion.

Applicant has appealed. Both applicant and the Examining Attorney have filed briefs, but an oral hearing was not requested. We affirm the refusal to register.

Our determination under Section 2(d) is based on an analysis of all of the probative facts in evidence that are relevant to the factors bearing on the likelihood of confusion issue. See *In re E. I. du Pont de Nemours and Co.*, 476 F.2d 1357, 177 USPQ 563 (CCPA 1973). In considering the evidence of record on these factors, we keep in mind that "[t]he fundamental inquiry mandated by Section 2(d) goes to the cumulative effect of differences in the essential characteristics of the goods and differences in the marks." *Federated Foods, Inc. v. Fort Howard Paper Co.*, 544 F.2d 1098, 192 USPQ 24, 29 (CCPA 1976).

Considering first the goods, applicant does not dispute that its vitamin and dietary food supplements and

² Registration No. 1,698,269 issued June 30, 1992; renewed. The word NATURAL is disclaimed apart from the mark as shown.

registrant's vitamin, mineral and protein supplements for human consumption are essentially identical. Moreover, applicant's and registrant's goods are of a type that would travel in the same channels of trade, namely health food stores and drug stores, to the same class of purchasers, namely the general public. Also, vitamins and supplements are relatively inexpensive items and purchasers would consequently not be expected to exercise a great deal of care in making their selections. Thus, if these virtually identical goods are sold under the same or similar marks, confusion as to the source or sponsorship of the goods would be likely.

Applicant argues that when the marks are considered in their entirety, they differ in overall commercial impression. According to applicant, given the differences in the words NATURAL and NATURE'S, the respective marks are sufficiently distinguishable to avoid a likelihood of confusion. Further, applicant argues that marks containing NATURAL or FOCUS are weak marks and therefore entitled to only a limited scope of protection.

We agree with the Examining Attorney, however, that when applicant's mark and registrant's mark are each considered as a whole, they are highly similar in sound, appearance, connotation and commercial impression. As

noted by the Examining Attorney, the words NATURAL and NATURE'S are similar not only in sound and appearance, but meaning as well. The Examining Attorney made of record the following definition from The American Heritage Dictionary of the English Language (Third edition 1992):

natural: 1. Present in or produced by nature: a natural pearl. 2. Of, relating to, or concerning nature: a natural environment. 3. Conforming to the usual or ordinary course of nature: a natural death.

It is readily apparent from this definition that "nature" and "natural" are highly similar in meaning. Thus, when the words NATURAL and NATURE'S are each combined with the identical word FOCUS, the resulting marks NATURAL FOCUS and NATURE'S FOCUS are substantially similar in their entireties.

Applicant contends that the cited mark NATURAL FOCUS is weak and therefore entitled to a limited scope of protection. In support of its contention, applicant submitted with its appeal brief a list of registrations of marks which contain the word NATURAL and a list of registrations of marks which contain the word FOCUS. The Examining Attorney has properly objected to this evidence. A mere list of third-party registrations is not the appropriate way to make such registrations of record, and the Board does not take judicial notice of registrations in

the USPTO. See *Weyerhaeuser Co. v. Katz*, 24 USPQ2d 1230 (TTAB 1992); *Cities Service Company v. WMF of America, Inc.*, 199 USPQ 493 (TTAB 1978); and *In re Duofold Inc.*, 184 USPQ 638 (TTAB 1974). Accordingly, applicant's references to third-party marks have not been considered in reaching our decision.³

Although there is no evidence of record that the word FOCUS is descriptive or highly suggestive of vitamins and supplements, we recognize that the word NATURAL is descriptive of such goods, as evidenced by the dictionary definition of the word "natural" and registrant's disclaimer of NATURAL. However, even weak marks are entitled to protection where confusion is likely. Here, the marks NATURAL FOCUS and NATURE'S FOCUS are so close in sound, appearance, meaning and commercial impression that, when used on essentially identical goods, confusion among purchasers is likely.

Decision: The refusal to register is affirmed.

³ We should also point out that evidence submitted for the first time with an appeal brief is untimely. Trademark Rule 2.142(d).